ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Public Gas Association, Petitioner,	)	
v.	)	Case No. 11-1485
United States Department of Energy, Respondent.	)	

MOTION OF PETITIONER FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR CLARIFICATION

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27, Petitioner American Public Gas Association ("APGA") moves for reconsideration, or in the alternative for clarification, of the Court's order of May 1, 2013 ("May 1 Order"). That order, *inter alia*, declines to rule on (i) the pending unopposed joint motion of APGA and Respondent U.S. Department of Energy ("DOE") to resolve this appeal by vacating the Direct Final Rule ("DFR") issued by DOE as it relates to energy conservation standards for non-weatherized gas furnaces[1] and remanding for further notice-and-comment proceedings regarding same, and (ii) the request by intervenor Heating, Air-Conditioning & Refrigeration

[1] *Energy Conservation Program: Energy Conservation Standards for Residential Central Air Conditioners and Heat Pumps*, Direct Final Rule, 76 Fed. Reg. 37408 (June 27, 2011); Notice of Effective Date and Compliance Dates for Direct Final Rule, 76 Fed. Reg. 67037 (Oct. 31, 2011).

Distribution International ("HARDI") to substitute as a petitioner in this case for purposes of pursuing its own issues. The May 1 Order requires the parties to "address in their briefs, in addition to the merits of the case, the issues presented by the motion to vacate in part and remand and the motion to substitute as petitioner, rather than incorporate those arguments by reference."

APGA requests that the Court reconsider the May 1 Order and rule that the unopposed motion to vacate and remand should be granted and that, consistent with this Court's clear precedent, the request of an intervenor to substitute as a petitioner in this case to pursue issues not raised by the Petitioner be denied. If, *arguendo*, the Court refuses to reconsider its May 1 Order, APGA requests that the Court clarify certain ordering paragraphs therein given that this case has been fully briefed on the merits and submitted. If further briefing is deemed necessary, it should be accomplished through supplemental briefs limited to the issues on which the Court declines to rule at this time – issues that are separate and apart from the merits of this case and on which the parties are differently aligned than on the merits.

I. Request for Reconsideration

APGA's entire case before the DOE addressed whether the DOE erred in issuing the DFR as it relates to non-weatherized gas furnaces.[2] APGA did not raise any issues regarding the validity of the DFR outside of the context of its rulings as to non-weatherized gas furnaces (note 2, *supra)*. Following the submission of briefs on the merits by all parties, APGA and DOE entered into mediation, from which a settlement resulted that resolved in their entirety the issues raised by APGA; the settlement provided for vacatur of the DFR as it relates to the fuel efficiency standards for non-weatherized gas furnaces and for notice-and-comment rulemaking to ensue on that same subject. Thus, the settlement addressed satisfactorily *all* substantive issues raised by APGA before DOE and this Court.

The joint motion to approve the settlement filed on January 11, 2013, was unopposed on the merits. The "Opposition" filed by certain Intervenor-Respondents[3] did not challenge the settlement on the merits; rather, it simply noted

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[2] APGA's evidentiary presentation, found at JA-590–664, is entitled "Technical Analysis of DOE Direct Final Rule on Minimum Efficiencies of Residential Furnaces," and that report, like the comments of APGA (JA-571–589), addressed only the proposed fuel efficiency standards in the DFR as they relate to non-weatherized (i.e., residential) furnaces. Likewise, APGA's briefs to this Court on the merits urged overturning the DFR only as it relates to the fuel efficiency standards for residential furnaces promulgated therein.

[3] *See* Opposition by Intervenor-Respondents City of New York, *et al.*, dated Jan. 25, 2013 ("Opposition").

the putative energy savings that would result from the DFR (Opposition at 3-4) and urged that the Court "require that DOE meet the timeline it set out in the motion." (*Id.* at 7) The Intervenors supporting Petitioner either did not respond to the motion[4] or indicated no objection to the relief requested in the motion.[5] Thus, there is no basis for not granting the unopposed joint motion at this time.

One intervenor, HARDI, while not opposing the relief requested in the joint motion, requested that it substitute as a petitioner in this case, arguing that the "proposed settlement leaves two-thirds of the DFR intact without addressing either DOE's abuse of the direct final rulemaking process or many of the DFR's substantive provisions challenged by HARDI." (HARDI Response at 1) HARDI maintained that "[b]oth APGA and HARDI have challenged and sought to vacate the DFR in its entirety." (*Id.* at 6)

HARDI is mistaken. APGA did not challenge the DFR in its entirety, but only the fuel-efficiency standards for residential furnaces.[6] The general rule in

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[4] Intervenor-Respondent Air Conditioning Contractors of America did not answer the joint motion.

[5] *See* Intervenor HARDI's Response to the APGA-DOE Settlement Motion and Motion To Substitute as Petitioner dated Jan. 25, 2013 ("HARDI Response") at 9-10, 19.

[6] *See* note 2, *supra.* HARDI knew from its participation in the proceeding below that APGA was only contesting the DFR as to the furnace efficiency standards. HARDI's reliance on APGA's petition for review as the basis for its argument that APGA was challenging the DFR in its entirety (HARDI Response at 5), is unavailing. HARDI knows that petitions for review are always broadly stated and

this Circuit is that "[a]n intervening party may join issue only on a matter that has been brought before the court by another party." *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990). This Court departs from that rule "only in 'extraordinary cases.'" *National Ass'n of Regulatory Util. Comm'rs v. Interstate Commerce Comm'n*, 41 F.3d 721, 730 (D.C. Cir. 1994) ("*NARUC*") (quoting *Lamprecht v. FCC*, 958 F.2d 382, 389 (D.C. Cir. 1992). One of the few exceptions was *Synovus Financial Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 952 F.2d 426, 433-34 (D.C. Cir.1991). However, in numerous subsequent cases, this Court has clarified that the exception was applied in *Synovus* solely due to the unique circumstances of that case: since the intervenor had prevailed below, it had no incentive to petition for review and it was raising a jurisdictional issue that was "logically anterior to [the principal parties'] case." *NARUC*, 431 F.3d at 730; *see also Core Communications, Inc. v. FCC*, 592 F.3d 139, 146 (D.C. Cir. 2010); *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161-62 (D.C. Cir. 2000); *U.S. Tel. Ass'n v. FCC*, 188 F.3d 521, 531 (D.C. Cir. 1999). In fact, the Court has made clear that at least one such factor must be present to establish such extraordinary circumstances. *AMSC*, 188 F.3d at 531. Neither of these factors nor any other extraordinary circumstances exist in this case.

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without definition as to specific issues (versus the later-filed statement of issues). The Statement of Issues filed by APGA on Jan. 30, 2012, makes crystal clear what HARDI already knew from the record below, which is that APGA's sole focus was the portion of the DFR related to furnace efficiency standards.

The record below and before this Court is clear: APGA, the sole petitioner in this proceeding, has only challenged the DFR in the context of its rulings related to efficiency standards for non-weatherized gas furnaces. HARDI's efforts to make it appear otherwise are mistaken, and it presented no unique circumstances that would warrant making an exception to the general rule that an intervenor may only raise issues that have been raised by the petitioner. Hence, HARDI has no standing to substitute as a petitioner in this proceeding.

Thus, what is before this Court are (i) an unopposed joint motion to vacate and remand the DFR as it relates to the issues raised by APGA on appeal and (ii) HARDI's request to substitute as a petitioner in this case to pursue issues not raised by APGA, without any showing of the unique circumstances that would warrant such substitution. These matters can and should be resolved by the Court based on the papers before it. APGA entered mediation because it believed that the process, if successful, would result in savings of time and resources. The Court's May 1 Order, if not reconsidered, means that mediation, while successful in addressing all issues raised by APGA, will have had the opposite result. Given the facts recited above, APGA respectfully requests the Court to reconsider the May 1 Order.

II. Request for Clarification

If the Court refuses to reconsider its May 1 Order, then APGA requests clarification. The Court's order seems to assume that this case has not already been fully briefed on the merits and/or that somehow the filing of the joint motion has changed the alignment of the parties on the merits. The May 1 Order provides (in the first ordering paragraph) as follows:

> The parties are directed [sic] address in their briefs, in addition to the merits of the case, the issues presented by the motion to vacate in part and remand and the motion to substitute as petitioner, rather than incorporate those arguments by reference.

It then orders in the third ordering paragraph that the parties submit within 30 days a "proposed format for the briefing of this case," observing that "the court looks with extreme disfavor on repetitious submissions and will, where appropriate, require a joint brief of aligned parties…."

This case has already been submitted on the merits, with all briefs and the joint appendix lodged with the Court, based on an alignment of the parties that has not changed. APGA does not believe the Court intended to require the parties to provide a schedule for briefing a case on the merits that has already been briefed on the merits, but rather to require the parties to file supplemental briefs only on outstanding issues not already briefed, raised by the two pending motions, rather than having the merits panel consider these motions based on the papers already

filed. APGA thus requests that the Court clarify that only supplemental briefs are now required.

There is good reason to have supplemental briefs on the pending motions rather than new briefs covering both the merits issues and the pending motions. Because the parties are aligned very differently on the merits of the case versus the two issues on which the Court has declined to rule, requiring alignment as to briefs addressing the merits and the outstanding issues related to the settlement will generate confusion, not coherence. For example, while APGA and DOE are aligned on the settlement issues, they are not aligned on the merits; while APGA and HARDI are aligned (at least as to the issues raised by APGA) on the merits, they are not aligned regarding HARDI's request to substitute as a petitioner; while APGA and Intervenor-Respondents are not aligned on the merits, they are aligned on HARDI's request to substitute as a petitioner; etc.

Thus, requiring re-briefing of this case by the parties, with aligning parties filing jointly, is self-defeating since (i) the merits have already been briefed and (ii) the post-briefing settlement issues (i.e., joint motion to vacate and HARDI's request to substitute as a petitioner) have already been argued to the Court in papers that reflect the new alignment of the parties *as to these issues*. If the Court desires that the two settlement-related issues be briefed (versus simply forwarding

the papers to the merits panel), then we respectfully suggest supplemental briefs be ordered only as to those specific issues.

CONCLUSION

For the foregoing reasons, APGA respectfully requests that the Court reconsider the May 1 Order and on reconsideration (i) grant the joint motion of Petitioner and Respondent to vacate in part and remand for further rulemaking, without change or condition and (ii) deny the request by HARDI to substitute as a petitioner in this proceeding. If reconsideration is denied, APGA respectfully requests that the Court clarify the May 1 Order such that, if additional briefing is deemed necessary, it be limited to supplemental briefs on the two issues on which the May1 Order declined to rule.

Respectfully submitted,

/s/ William T. Miller
William T. Miller
Randolph Lee Elliott
Jeffrey K. Janicke

MILLER, BALIS & O'NEIL, P.C.
1015 Fifteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 296-2960

Attorneys for
American Public Gas Association

Dated: May 13, 2013

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that, on this 13th day of May 2013, the foregoing "Motion of Petitioner for Reconsideration or in the Alternative for Clarification" was served upon the counsel listed below through the Court's CM/ECF system.

Respectfully submitted,

/s/ Jeffrey K. Janicke
Jeffrey K. Janicke
Miller, Balis & O'Neil, P.C.
Twelfth Floor
1015 15th Street, N.W.
Washington, DC 20005
Phone: (202) 296-2960
Fax: (202) 296-0166
jjanicke@mbolaw.com

Counsel	Service
Amber Dale Abbassi Cause of Action 1919 Pennsylvania Avenue, NW Suite 650 Washington, DC 20006 amber.abbasi@causeofaction.org	CM/ECF

Frederick Don Augenstern I Office of the Attorney General, Commonwealth of Massachusetts Environmental Protection Division One Ashburton Place 18th Floor Boston, MA 02108 fred.augenstern@state.ma.us	CM/ECF
Jonathan Hughes Blees California Energy Commission MS-14 1516 Ninth Street Sacramento, CA 95814 jblees@energy.state.ca.us	CM/ECF
H. Thomas Byron III U.S. Department of Justice (DOJ) Civil Division, Appellate Staff 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 H.Thomas.Byron@usdoj.gov	CM/ECF
David Brett Calabrese Air-Conditioning, Heating and Refrigeration Institute 2111 Wilson Boulevard Suite 500 Arlington, VA 22201 dcalabrese@ahrinet.org	CM/ECF
Morgan Anna Costello Office of the Attorney General, State of New York The Capitol New York State Department of Law Albany, NY 12224-0341 morgan.costello@ag.ny.gov	CM/ECF
Daniel Zachary Epstein Cause of Action 1919 Pennsylvania Avenue, NW Suite 650 Washington, DC 20006 daniel.epstein@causeofaction.org	CM/ECF

Monica Derbes Gibson Venable LLP 575 7th Street, NW Washington, DC 20004 mdgibson@venable.com	CM/ECF
Douglas Haber Green Venable LLP 575 7th Street, NW Washington, DC 20004 dhgreen@venable.com	CM/ECF
Charles Harak National Consumer Law Center 4th Floor 7 Winthrop Square Boston, MA 02110 Charak@nclc.org	CM/ECF
Katherine Kennedy Natural Resources Defense Council 40 West 20th Street 11th Floor New York, NY 10011 kkennedy@nrdc.org	CM/ECF
Christopher Gene King New York City Law Department 100 Church Street New York, NY 10007 cking@law.nyc.gov	CM/ECF
Benjamin Hoyt Longstreth Natural Resources Defense Council 1152 15th Street, NW Suite 300 Washington, DC 20005 blongstreth@nrdc.org	CM/ECF

Joseph McCalmont Mattingly Air-Conditioning, Heating and Refrigeration Institute 2111 Wilson Boulevard Suite 500 Arlington, VA 22201 jmattingly@ahrinet.org	CM/ECF
Michael J. Myers Office of the Attorney General, State of New York The Capitol New York State Department of Law Albany, NY 12224-0341 michael.myers@oag.state.ny.us	CM/ECF
Michael S. Raab U.S. Department of Justice (DOJ) Civil Division, Appellate Staff 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 michael.raab@usdoj.gov	CM/ECF